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The Dilemma and Resolution of the Non-Discrimination Principle: Research on the Evolution of Supervisory Mechanisms Amidst the Impact of the Pandemic Crisis

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Abstract. WTO member states have been striving to address the constraints on international trade imposed during the COVID-19 pandemic. Many nations have expressed concerns that the WTO system appears fragile when it comes to flexibility during challenging times. To date, however, there remains no effective solution to alleviate these restrictions in the face of an urgent pandemic. This essay posits that the WTO should consider reform strategies to prevent future pandemic crises. It suggests that all member nations must strictly adhere to current WTO rules, providing scientific evidence to justify trade restrictions. Despite the WTO's mandate to maintain fair trade among members, the system has failed to establish a supervisory strategy that ensures compliance from all nations. Over time, due to the absence of such a supervisory structure, some countries have altered existing rules to suit their own interests without notifying other members. Even when other members lodge complaints about these actions, there is often no timely response. Therefore, a reform of the WTO rules is necessary to address this loophole. Although the current system is vulnerable, under normal circumstances, it does balance and protect the fair trading rights of member nations. It simply requires an update to its rapid response mechanisms in the event of a pandemic.

Keywords: Covid-19, Most-Favored-Nation, Non-Discrimination Principle, Supervisory Mechanisms, Pandemic Emergencies

1. Introduction

The structure of the World Trade Organization (WTO) is predicated upon advancing free trade within a framework of fair competition through the enforcement of non-discrimination rules, specifically the Most-Favored-Nation (MFN), that is “treating other nations equally” and National Treatment obligations, that is treating foreigners and locals equally [1]. They are designed to ensure that all member states, irrespective of their political or economic power, are not subject to discrimination or unfavorable treatment. However, emergencies such as the recent COVID-19 pandemic have created turbulent conditions that further undermine the purpose of the WTO's Non-discrimination rules. The MFN clause stipulates that all member states must extend trade advantages to one another immediately and without condition [2]. The Non-discrimination principle prohibits discrimination against foreign products in terms of tariffs and quotas within the domestic market.

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The synergy of these two elements constitutes the core value and establishes the foundation of the multilateral trading system. Regrettably, the application of these rules is far from absolute during a pandemic crisis. During the COVID-19 pandemic, member states, including China, have implemented their own measurement standards to regulate the importation of goods in the interest of public health protection. They have also introduced new policies targeting imported goods that lack acceptance by the WTO or any other member states. These measures have been criticized as potential instances of disguised protectionism and selective enforcement, which also point out the long standing dilemma: How can the WTO refine its current monitoring mechanisms to effectively tackle discriminatory measures enacted during public health emergencies?

This paper commences by scrutinizing the ramifications of WTO regulatory shortcomings that precipitated inequitable treatment among member states in the wake of the pandemic's abrupt onset. The discussion will then explore the reasons behind the inadequacy of the current WTO supervision mechanism in addressing discriminatory measures during public health crises. Finally, this paper will suggest how WTO regulations impose constraints on the utilization of temporary trade restriction measures, thereby necessitating action in current policy reform to ensure the WTO's system continues to fulfill its obligation of maintaining fair trade.

2. The ineffectiveness of WTO oversight

The current principal challenge facing the WTO is its regulatory ineffectiveness. There is no standardized emergency protocol to address crisis situations, including specific triggering conditions and default measures. None of the existing agreements explicitly delineate predetermined criteria for public health emergencies. GATT Article XX(b) authorizes member states to implement measures that are "necessary to safeguard human, animal, and plant life or health."[3] These measures must be based on risk evaluations and adhere to international standards. However, member states are granted the discretion to determine their "suitable level of protection." [4] There exists no standardized criterion for assessing the urgency and gravity of health risks. Thus, all member states have established their own standards of measurement, which lack consistency and may result in a haphazard combination of measures. Article 5.7 of SPS provides for the implementation of provisional measures in instances where scientific evidence is lacking due to time constraints. Nevertheless, the current WTO rules fail to stipulate a mandatory validity period for these measures or a default review interval. At the beginning of the COVID-19 pandemic, due to the uncertainty and rapid evolution of the situation, countries tended to adopt temporary solutions that may have exceeded the necessary level. Uniform measurement standards challenge the severe relationships between trading countries, especially under circumstances where it is difficult to gather statistics in a timely manner. Some member nations adopted preventive and restrictive measures, particularly in relation to the cold chain. Even if these measurement standards were temporary, the timeframe for which these measures would be in place was uncertain and may have exceeded the expected time frame. Such actions obviously violate WTO non-discrimination rules.

From a legal perspective, the optimization of China's protocols for restricting foreign cold chain goods warrants careful consideration. During the COVID-19 pandemic, China implemented protective measures to an extreme degree that may potentially contravene non-discrimination rules. It is not appropriate to assert that China deliberately instituted its protective measures with the intent of opposing other nations for political purposes. The emergence of COVID-19 was so swift that the actions taken seemed to be the sole recourse available to mitigate the fear and anxiety among the populace regarding the pandemic's detrimental effects. On September 11, 2020, China implemented measures to restrict foreign cold chain goods based on its own standards, ostensibly in response to

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public health concerns related to viruses potentially transmitted through imported cold chain products, in line with WTO regulations [5]. However, the scientific justification and transparency of these measures have been questioned. Critics argue that China's approach may violate Article 2.2 of the SPS Agreement due to a lack of sufficient scientific evidence. In fact, the United States has already filed complaints regarding this issue [6]. Both parties maintain the stance that they are upholding their commitments as members of the WTO. China asserts that it is in compliance with the provisions of Article 5.7 of the SPS Agreement by implementing provisional measures aimed at mitigating public health risks associated with the pandemic, in the absence of definitive measurement standards. The United States posits that China should provide scientific evidence to substantiate its protective measures for greater credibility, or alternatively, lift the restrictions to promote fair trade practices. The complaints remain unresolved to this day and have gradually faded into obscurity as time has passed. This implies that should a similar pandemic occur in the future, there would still be no clear resolution in place. Consequently, absent compelling evidence and scientifically sound measurements that are broadly accepted by the majority of other states, no entity should unilaterally alter existing regulations without first informing member nations.

3. WTO oversight amidst public crisis

The WHO terminated the Public Health Emergency of International Concern (PHEIC) status for COVID-19 on May 5, 2023. Nonetheless, the absence of a universally accepted measurement standard and independent oversight persists as unresolved issues. This has revealed a second deficiency, namely that the existing WTO framework is insufficient for tackling discriminatory measures that arise during public health crises. The WTO rule is designed to foster a stable trade environment, allowing for broader discretionary powers or delays in emergency characterized by rapid change and insufficient data. In instances where the legal framework permits disparities, the provisions for exceptions under GATT may be excessively flexible. This could potentially allow for the justification of measures intended to safeguard human health, despite the possibility that the empirical evidence supporting such measures may be insufficient to substantiate their necessity. The lack of clear transparency and compliance incentives may also lead to imbalances in WTO supervision. The volume of SPS/TBT notifications has surged, there are consistently delays in the delivery of notices, accompanied by incomplete information and insufficient updates, resulting in a hazy comprehension of updated information among trading partners. During the COVID period, it was common for members to receive updated information only after the relevant measures had already been implemented. Under the TBT agreement, it is stipulated that all pertinent measures must be announced prior to countries initiating actions. In the instance where China enacted their temporary import regulations, they failed to inform other member nations, which led to discontent among those members. Consequently, a more adaptable strategy should entail establishing one’s own risk assessment criteria and notifying other member nations within a designated time frame, allowing them to provide feedback on the acceptability of the new measurement standard.

4. Third - party supervision mechanism

The prevailing WTO regulations are predominantly dependent on self-notification, a mechanism that, as the COVID-19 crisis has starkly illustrated, yields delayed and fragmentary data, often bereft of scientific validation and not refreshed in sync with policy alterations. These inadequacies have eroded the foundational principles of transparency and non-discrimination within the regulatory structure. Despite the rectification of these flaws, the new policy still ultimately faltered owing to

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the inconsistent implementation by member states, exacerbated by the lack of third-party monitoring. Thus, an expert panel comprising specialists in public health and international trade law could be established under the auspices of the WTO to provide advisory services, mediate disputes, and, when required, expedite concerns to the Dispute Settlement Body with greater efficiency. To navigate this complex issue, it is essential to develop a risk assessment framework that adheres to international standards, such as those established by the Codex Alimentarius [7], which is jointly managed and supervised by FAO and WHO. In the wake of a 32 percent decline in global merchandise trade in 2020 (FAO Covid-19 Response and Recovery Programme, 2020-2024), Codex initiated efforts to establish international guidelines on food hygiene, encompassing the handling of meat and other food products, as well as measures to control viruses in goods. At this stage, scientific evidence confirming the transmission of viruses via frozen foods remains elusive. What is notably absent is an organization tasked with monitoring risk assessments from manufacturing countries that could pose a threat to public health elsewhere. Such assessments should be based on Codex reference standards and submitted by the exporting state within a specified time frame, such as four weeks, under the joint supervision of Codex and the WTO.

SPS Annex B Article V and VI delineate a precise notification protocol to be followed by member states in the absence of international standards, guidelines, or recommendations. This protocol mandates that member states promptly inform other members of alterations to their local regulations in situations of emergency. Nevertheless, these stipulations fail to specify an exact temporal boundary to guide the immediacy of such notifications, thereby introducing a level of ambiguity. It is thus recommended that should a member state enact SPS emergency measures without prior notification, it must disseminate a public announcement employing the standard template within 72 hours. This announcement ought to encompass the product's HS code [8], the essence of the emergency, the criteria for review, and the expiration date. Subsequent to the adoption, member states are mandated to initiate a comment period that exceeds 30 days and to disseminate the response matrix. Member states are obligated to furnish revised supplementary documents containing risk data at intervals of 30, 60, and 90 days. Should updates not be effectuated within these specified periods, the measure shall lapse. Upon receipt of a notification from a member state within a 72 - hours period, a rebut table presumption shall apply in any subsequent dispute: the measure in question is not supported by a risk assessment that is proportionate to the specific circumstances, and the extent of the trade restriction exceeds the necessary limits, unless countered by evidence concurrent with the implementation of the measure. Measures leading to unreasonable delays, including the acceptance of remote audits and electronic authentication where feasible, should be avoided. During the period when a state of emergency was declared, the relevant control, inspection and approval procedures should be carried out in accordance with the established procedures and no changes are allowed. Upon the proclamation of a state of emergency, the relevant control, inspection, and approval processes are to be conducted in strict accordance with the established procedures, and no modifications shall be made. The intent is to establish that, from a theoretical perspective, the emergency measures are not only practicable but also possess a high probability of effectiveness. Nevertheless, their execution necessitates adherence to a predetermined temporal framework and must be substantiated by traceable evidence.

5. Discussion

As previously discussed, the current WTO rules are characterized by their rigidity and inflexibility, rendering the WTO's supervisory mechanisms inadequate to address discriminatory measures during public health crises. Furthermore, in the aftermath of Covid-19, the prevailing WTO principles have

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not only failed to preemptively address potential issues but have also neglected to implement any preparatory measures for future crises. Although China has indeed adopted certain measures that other member nations have strongly criticized for their lack of scientific evidence during this pandemic, these measures have been rooted in the principle of safeguarding its own national public health security. This could indicate varying interpretations of the GATT. Approaches to mitigate future pandemics require not only the upgrading of current systems but also the enforcement of stringent third-party scrutiny to assess the appropriateness and scientific accuracy of import volume standards set by member states for preserving their public health security. Furthermore, any alterations made by one member must be disseminated to all other member nations.

6. Conclusion

In summary, the WTO represents a multilateral accord among various countries, encompassing not just economic facets but also political considerations. Both GATT and SPS have set forth regulations grounded in scientific rationality. Nevertheless, to avert the exploitation of potential gaps in the present framework by certain nations, it is imperative to incorporate third-party oversight. Concurrently, the WTO must disseminate notifications concerning all modifications to member nations' trade regulations, ensuring transparent evaluations. The creation of international benchmarks is crucial for upholding the equity of WTO rules, supervised by an additional international entity. Future global challenges could surpass the severity of COVID-19, necessitating the WTO to learn from this experience and acknowledge the flaws in the current system. Hence, initiating reforms in the existing framework is essential to forestall future crises, in conjunction with collaborative supervision. The system should adapt flexibly to situational changes, rather than adhering to a rigid, mechanical structure. Despite unresolved disputes among countries during the pandemic, which have not yet entered a formal resolution phase, these issues underscore the intricate balance between public health sovereignty and trade commitments. Consequently, the current WTO system requires reform to ensure maximum fairness in trade among member nations.

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